

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1443

Original & Affidavit of Mailing

To be argued by
RODNEY G. SMITH

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1443

UNITED STATES OF AMERICA,

Appellee,

- against -

DENNIS BENNETT,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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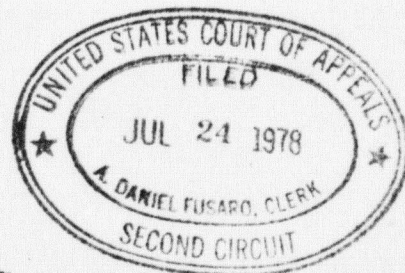


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BRIEF FOR THE APPELLEE

PRELIMINARY STATEMENT

Dennis Bennett brings this consolidated appeal from a judgment and an order of the United States District Court for the Eastern District of New York.

The judgment from which appeal is taken was entered on September 30, 1977 (Jacob Mishler, Ch. J.), convicting Bennett, after a jury trial, of (1) conspiracy to

distribute quantities of heroin and (2) aiding and abetting in the knowing and intentional possession of heroin with intent to distribute, violations of 18 U.S.C. §2 and 21 U.S.C. §§841(a)(1) and 846. Bennett was sentenced on each count to concurrent terms of ten years imprisonment, plus special parole terms of twenty years. As a special condition of parole, the trial court directed that if Bennett were to be deported, "he is not to re-enter the United States, its territories or possessions during this special parole term".

Notice of appeal was filed on September 30, 1977. The appellate proceedings were stayed pending the disposition of Bennett's motion pursuant, to 28 U.S.C. §2255, for an order vacating and setting aside the judgment of conviction. The district court (Jacob Mishler, Ch. J.) denied that motion on April 17, 1978. A notice of appeal was thereupon filed on May 15, 1978. On May 30, 1978, this Court consolidated the two appeals.

On appeal, Bennett makes three claims: first, that he was denied the effective assistance of counsel at trial, in violation of his Sixth Amendment right thereto, in that trial counsel failed to comprehend fully the government's case; second, that the trial judge's charges concerning entrapment and the specific nature of the alleged crimes constituted plain error; and third, that the jury's verdict on both counts was not supported by sufficient evidence.

STATEMENT OF FACTSA. The Government's Case

The government's evidence at trial was comprised of the testimony of four individuals: Carolyn Usher, the girlfriend of Bennett; Michael Thomas McGaff, a Los Angeles Police Officer; Thomas Sharkey, a Special Agent of the Drug Enforcement Administration; and Joseph McNally, a professional handwriting analyst. Through these witnesses various pieces of documentary evidence and recorded statements, described in detail below, were introduced. Taken as a whole, the evidence revealed the following:

1. Shortly before 8:00 p.m. on the evening of March 25, 1977, Special Agents of the Drug Enforcement Administration (DEA) assigned to narcotics interdiction duty at John F. Kennedy Airport in New York City were notified of a telephone call received from Los Angeles Police Officer Michael McGaff. The call indicated that Officer McGaff, assigned to narcotics surveillance duties at Los Angeles International, had observed two men and a woman board United Airlines Flight 8 for New York City after exhibiting various traits characteristic of drug traffickers (Tr. 31-35).^{*/} Among the D.E.A. personnel alerted was Special Agent Sharkey, who observed the three individuals

^{*/} "Tr." refers to the trial transcript; "Gx" to the government's exhibits introduced at trial; and "App." to appellant's Appendix.

deplane from Flight 8 and, following a period of surveillance, placed them under arrest. The circumstances of that surveillance and arrest are not in issue here.

One of the individuals arrested on March 25, Francisco Estrada-Ponce, was found at the time of his arrest to be in possession of approximately two pounds of "brown rock" heroin. After being advised of his constitutional rights, Estrada-Ponce provided the arresting agents with certain information concerning his intended delivery. He then agreed to make a "controlled delivery" to the intended recipient -- appellant Dennis Bennett (Tr. 37-45).

The arrangements for the "controlled delivery" included renting two adjoining rooms at the Sheraton Motor Inn near Times Square in the early morning hours of March 26. From one of the rooms, Estrada-Ponce began attempting to contact Bennett by telephone. On the two occasions when the call was answered, the conversations were recorded, with Estrada-Ponce's consent (Tr. 43-47).

2. The first recorded conversation occurred at about 12:15 p.m. on March 26, 1977, when one Carolyn Usher answered Bennett's telephone. The tape and a transcript thereof were introduced as evidence at trial. The transcript (Gx 26) reads as follows:

March 26, 1977 at 12:15

F: FEMALE VOICE
M: MALE VOICE
F: Hello
M: Hello Carol?
F: Oh well, hi
M: Hello
F: How you doing?
M: All Right.
F: Oh you just got back from Mexico?
M: Yea I come from Mexico.
F: Oh you should have seen my phone busy.
I wanted to call you try to get with you.
M: Oh I call you all night, I you all
night Carol.
F: No, you know why my phone, you know I
have my phone on the jack and I plug
it out sometimes that's why you can't
get in touch with me.
M: Oh yea.
F: Well we talk about you every day, this
guy call the other day, he asked for
you, what you doing, or when you
coming or something, you know I tell
I don't know cause we haven't heard.
Cause remember you called and gave me
the new phone number?
M: Yea
F: We've been calling and calling, calling
they say you not there.

M: Yea but I got some problems, you know
down there in Mexico, too hard you know.

F: Aha, things hard, How's Ana?

M: Ana, Ana is pretty good she's with me.

F: How is, listen you going to bring her
back right?

M: Yea

F: I was thinking about her the other day
you know I could give her, you know like
the baby shower, because you know like
a party for the baby.

M: Yea

F: Right cause the baby's coming soon right.

M: Yea coming soon the baby

F: Aha

M: A ha. Hey, what's happening with my
buddy

F: Well, he is all right, I seen him every
time, but, em he, I won't probably see
him until later on. You want him call
you?

M: Look, I'm in the Sheraton Hotel.

F: Where?

M: In the Sheraton Hotel

F: In New York?

M: Yea I'm here in New York

F: Are you kidding?

M: Really

F: Ana there with you?

M: Eh?

F: Ana there with you?

M: Yea Ana is with me

F: When you came?

M: Last night. I try call you, all last night.

F: No the phone is was out, you know.

M: Nobody answer

F: No its, see we don't hear the ringing when I plug it out the wall, you hear it ring but I don't hear it ring

M: Eh?

F: I don't hear the phone ring, you know cause I pull it out, I can turn it off and turn it on.

M: Uh huh, O.K.

F: So, ah, you have the number then?

M: Yea I got the, I am, I am, I am in Room 1608

F: What's that the one on 40th Street?

M: Yea the one I stay all the time. Yea the Sheraton Hotel.

F: Yea, it's better that you didn't go to the Stadium,* / cause the guy, you know.

M: Yea it's too many people there

F: Uh huh

M: Look tell, eh tell, tell Dennis I got the merchandise, O.K.

F: Uh huh O.K. what's the room number

M: Room number, its 1608

F: 1608

M: Yea

F: O.K. well eh, I don't know, I have to wait till he calls me

M: Uh huh

F: And then, ah, I'll tell him you know

M: O.K.

F: But I.. the number there is what 5, 6, you don't know the number?

M: Yea 695-65 double 0

F: Uh huh, and 1608

M: 1608

F: Uh huh, o.k. then well I'll have him call you or then I'll call you back later, o.k.?

* / In an investigation conducted following Bennett's arrest, it was discovered that Bennett and Estrada-Ponce had stayed in adjoining rooms at the Stadium Motor Lodge in the Bronx on January 12, 1977 (Tr. 75-78, Gx 23 and 24).

M: O.K. tell him as soon as he can you know, because I gotta, I gotta leave, I gotta go back down there, you know some peoples waiting for me down there.

F: Uh huh

M: O.K. so tell -

F: By next week?

M: No I gotta go back eh, in a couple, eh tomorrow, I like to go back.

F: Uh huh, O.K. then well I'll tell him I'll try and get in touch with him, O.K.?

M: O.K.

M: O.K.

F: O.K. and I'll call you back

M: What, what time, what time you coming eh?

F: I don't know I'll try and call now but see I don't know, but I'll call you as soon as I hear from him and I'll let him call you and then we'll come down there later on.

M: O.K. you don't got any phone numbers to give it to try to call for him?

F: For him?

M: Yea

F: No, just eh, just this friend someone, he usually be there, sometimes, you know but I just call there cause I wanta get in touch with him, but he's not there.

M: O.K.

F: But I'll try and get in touch with him,
he's supposed to call me and I'll have
him call you, O.K.?

M: O.K. so eh Carol, I'll wait for your call
O.K.

F: Right O.K. fine bye-bye.

M: Bye-Bye.

[END OF FIRST PHONE CALL].

It should be noted that Bennett was in fact present with Miss Usher at the time of this conversation, but declined to speak to Estrada-Ponce on the telephone (Tr. 24).

After waiting several hours for Bennett to return the call, Estrada-Ponce placed another recorded call to Bennett at about 7:00 p.m. on March 26. The transcript of that conversation (Gx 26), which was introduced at trial along with the tape, reads as follows:

March 26, 1977 - 7:00 P.M.

F: Hello

M: Hello, Carol there?

F: Oh hi Frankie

M: Hello Carol

F: Hi I haven't heard from
DENNIS yet.

M: You didn't touch with him

F: No I can't get in touch with him and I haven't heard from him, but as soon as I hear from him I'll tell him to call you O.K.?

M: O.K.

F: I'm right here I'm waiting for him to me cause I never been out the house I'll be right here, O.K.? In case if he calls you know?

M: Aha

F: I'll give him your message for him to call you.

M: O.K., tell to call me right away because eh I gotta, gotta go you know

F: Yea

M: I can't stay so long here.

F: Aha

M: O.K.

F: O.K. then

M: O.K.

F: Bye Bye

M: By

[END]

Miss Usher's testimony at trial revealed that Bennett had been at her side during this conversation also (Tr. 24).

3. Approximately one and a half hours after the second conversation, Bennett appeared at Estrada-Ponce's hotel room (Tr. 55). The agents were hidden in the adjoining room, and Estrada-Ponce's room was equipped with a concealed radio transmitter and a sample of the heroin involved. A receiver in the agents' room was used to record the conversation between Estrada-Ponce and Bennett. A recording of the conversation (Gx 10) was played to the jury; a transcript was prepared (Gx 25) for identification and, though not introduced in evidence, its accuracy was agreed upon by both attorneys and it was used by the jurors as they listened to the tape. The transcript reflected the following conversation:

March 26, 1977 - 8:25 P.M.

I	<u>BENNETT</u>
II	<u>FRANCISCO</u>
I:	I was asleep
II:	Oh, too bad, eh, what's going on?
I:	(Inaudible word) ...Ana come?
II:	No, eh, eh, downstairs, at a restaurant, downstairs with my brother.
I:	Your brother come?
II:	Yea...(inaudible words) I tell you your stuff up here on top.
I:	So once, eh (inaudible words) I wanta go
II:	O.K....(inaudible words)

II:* Chiva
I:* Oh, Chiva?
[Movement Noise, no conversation]
II: So what's going on, where is eh, where is Carol?
I: Downstairs, she's downstairs, she didn't come up, you know, no parking space.
II: She no?
I: No.
I:* I'm going to take this, take this, test out right away. Eh, what's this here now.
II:* The pure stuff
I:* Chiva?
II:* You know, CHIVA
I: O.K. cool
II: The pure stuff
I: How much is it?
II: I don't know I gotta get the weight.
I: O.K.
I:&II: (inaudible words)
I: You got about a kilo, you got about a kilo.
II: 2 kilos, with a kilo of cut... in-
audible.

* Corrected with consent of counsel.

I: How good is it?

II: It's pure, pure, pure. Pure stuff, pure stuff.

I: Pure stuff eh, how much is a kilo?

II: I don't know...should take three (inaudible)

I: Inaudible...the cut too, eh, you know

II: Inaudible...the cut...

I: O.K. good let me get on the case test. I'm going to take it to some people.

II: Money, you give me money, a little money for me?

I: No I don't have no money Frankie.

II: Oh my God, I've run out of money, you know, have no money here.

I: Well I'm going to try and get you some. I'll see if I can sell some of this tonight.

II: Cause, I gotta go tomorrow, you know.

I: You gotta go tomorrow?

II: I have to go with my brother (inaudible) do it, right here, you know and Ana is sick.

I: Ooh

II: He, he run out of, he rent a car at airport, you know my brother he got the Hertz cars, you know and eh, he rent a car, and eh, take care Ana downstairs to the streets over there 42. Forty second and I wait for there last night.

I: Yea, but you didn't call the house, did you?

II: Yea, but that phone not answer.

I: May I wasn't in.

II: Eh, Carol said he's in (inaudible word)

I: Oh yea, oh because some people was calling the house and telling her and writing my wife and telling my wife I was living with her.

II: Oh no, fuck

I: That's why she pulling the phone off.

II: Oh, OK.

I: Em, God-Damn

II: You do something right away man because I, gotta move these things and ... go back.

I: If you have a scale I could

II: Heh?

I: If you had a scale I could put some up there

II: Oh, no

I: And weigh it, so I could pay you

II: Well go sell, go weigh these things, sell this thing and come on back with the scale, with a guy whatever.

I: This I'm going to give this for sample I'm going to let them check it out.

II: Oh, oh, O.K.

I: (Inaudible) then try and sell it like it is

II: Oh, o.k.

I: It's not cut, right, it not cut?

II: No, no, no, no, it's the pure stuff.

I: Oh, is it pure?

II: The pure stuff, yea.

I: It's going for 33?

II: Yea, 33.

[END OF RECORD CONVERSATION]

4. Following this conversation, Bennett left Estrada-Ponce's room and was immediately placed under arrest in the corridor outside. A search of Bennett's person incident to that arrest revealed that he was in possession of the sample of heroin left in Estrada-Ponce's room by the agents (Tr. 45, 58-59) as well as two cards, each bearing Estrada-Ponce's name and a phone number (Gx 11 and 12). One of the cards (Gx 11) also bore a California residential address.

At the time of his arrest, Bennett, after being advised of his constitutional rights and the nature of the charges against him, but while unaware that the agents had monitored his conversation with Estrada-Ponce, attempted to exculpate himself by telling the agents that the heroin found on his person had been given to him by Estrada-Ponce for his personal use (Tr. 64-65). Bennett also stated to

the agents that, during his discussions with Estrada-Ponce in the hotel room, he believed Estrada-Ponce had marijuana, rather than heroin, for sale (Tr. 138).

5. As noted (p. 9, supra), the government produced evidence, consisting of hotel records and expert handwriting analysis, showing that Bennett and Estrada-Ponce had stayed in adjoining rooms at the Stadium Motor Lodge in the Bronx on January 12, 1977 (Tr. 75-78, 169, Gx 23 and 24).

The Government was subsequently permitted, pursuant to Rule 404(b), F. R. Evid., to enter into evidence a certified copy of Bennett's conviction on February 6, 1974, in the Southern District of New York, of distributing and possessing with intent to distribute a total of 41.87 grams of heroin, for which he was sentenced to a term of four years imprisonment (Gx 28).

Finally, Special Agent Sharkey testified that a total of somewhat over one thousand grams of heroin had been seized in the case, including the approximately 1.45 grams found on Bennett's person at the time of his arrest. The parties at trial stipulated that a chemical analysis of the substance had shown it to be heroin.

The court, with the consent of the defendant, took judicial notice of the fact that Estrada-Ponce had been scheduled to testify, but had absconded and his bail of \$50,000 forfeited (Tr. 153-156).

B. The Defense Case

The defense case at trial consisted of two primary strategies. The first, on both cross-examination of Agent Sharkey and summation, was to suggest and then exploit ambiguities in the hotel room conversation between Estrada-Ponce and Bennett (Gx 25), to the effect that Bennett had believed himself to be negotiating the purchase of marijuana rather than heroin (Tr. 130-148). Counsel was successful in bringing out on cross-examination of Agent Sharkey that the latter recalled an exculpatory statement by Bennett concerning marijuana at the time of his arrest (Tr. 138).

The second avenue pursued by the defense at trial concerned the possible entrapment of Bennett by Estrada-Ponce, acting as a government agent on the night of March 26. Again and again, counsel pounded home the theme that his client had arrived at the Sheraton Hotel room an innocent man, wholly ignorant of any plan to distribute drugs, and then and only then had he been persuaded by Estrada-Ponce to participate in the distribution of heroin (Tr. 237-239; 242-244). Bennett himself did not testify, nor did he call any witnesses.

C. The 28 U.S.C. §2255 Proceeding

In his motion for an order vacating and setting aside the judgment of conviction, made in December 1977, pursuant to 28 U.S.C. §2255, Bennett asserted -- in support of his claim (renewed here) that he was denied the

effective assistance of counsel -- that while his trial counsel had been aware before trial of Bennett's claim that he owed Estrada-Ponce \$400.00 on a personal loan, secured by a pledge of jewelry, counsel had failed to offer the existence of that obligation as an explanation for Bennett's arrival at Estrada-Ponce's hotel room on March 26. Though it is undisputed that Bennett represented to trial counsel in a pre-trial conversation that this obligation existed, the remainder of the "facts" as presented in connection with Bennett's \$2255 motion consist of hearsay and double hearsay, a good deal of it in direct conflict with sworn testimony at trial, particularly that of Carolyn Usher (Tr. 26).

ARGUMENTPOINT IDEFENDANT WAS NOT DEPRIVED OF THE
EFFECTIVE ASSISTANCE OF COUNSEL

Bennett asserts that he was deprived of his Sixth Amendment right to the effective assistance of counsel. Observing that Estrada-Ponce was acting as an agent for the government shortly after his arrest and that Bennett could not have "conspired with" or "aided and abetted" a government agent, Bennett claims here that trial counsel failed to comprehend the "fact" that Bennett's conduct in the Sheraton Hotel room was at most only evidence of a prior plan, rather than comprising a part of the substantive charges against him. Bennett goes on to claim that due to this failure of comprehension, counsel neglected to present a substantial defense based on Bennett's alleged loan/pledge arrangement with Estrada-Ponce; Bennett asserts that this arrangement had "tremendous significance" (Br. 24) with regard to the prior dealings between Bennett and Estrada-Ponce and indeed provided an innocent explanation for Bennett's presence in the hotel room on March 26 -- i.e., that he went there to discuss the payment of a \$400 debt to Estrada-Ponce.

Bennett, of course, bears a heavy burden in order to prevail in his Sixth Amendment claim. It is settled in this Circuit that representation by counsel, to be ineffective as a matter of law, must be "such a kind as to shock the conscience of the Court, and make the proceeding a farce and a mockery of justice." United States v.

Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). See LiPuma v. Comm'r., Dept. of Corrections, St. of N.Y., 560 F.2d 84, 90-91 (2d Cir. 1977); United States v. Medico, 557 F.2d 309, 318 (2d Cir. 1977); United States v. Rodriguez, 556 F.2d 638, 642 (2d Cir. 1977); United States v. Taylor, 562 F.2d 1345, 1360 (2d Cir. 1977); Rickenbacker v. Warden, 550 F.2d 62, 65 (2d Cir. 1976). As we show below, Bennett cannot make such a showing here, and indeed he falls far short of meeting even the arguably less stringent tests applicable in some other circuits.

1. Preliminarily, we take issue with the bald assertion (Br. 21) that trial counsel "simplistically" believed that "the actions of [Bennett] in the hotel room during the controlled delivery constituted the only acts of conspiracy, aiding and abetting." That this assertion is itself unfairly simplistic is revealed repeatedly in trial counsel's summation:

[The prosecutor] is going to set out to prove a conspiracy as charged in the first count existed. What is his proof that a conspiracy existed? His proof that a conspiracy existed is that Francisco Ponce, his girlfriend, whatever, Anna, Mr. Bennett and Carolyn had dinner. Therefore we have a conspiracy between Francisco and Dennis Bennett. That's it (Tr. 231).

* * *

Not one person has put Mr. Ponce and Mr. Bennett anywhere near together before March 26, other than that one meeting (Tr. 231). (Emphasis added).

* * *

Up until March 25, at which time Francisco Ponce was caught with all this stuff in the suitcase, just frame that period of time. That's all I ask you, to frame that period of time (Tr. 232).

* * *

Now, I brought my focus as to what happened through March 25, about this so-called conspiracy (Tr. 234). (Emphasis added).*/

Trial counsel's arguments were clearly aimed at every phase of the conspiracy, as a prelude to his attack on the government's evidence concerning the final and crowning acts of March 26. The fact that, in meeting the

*/ That the jury was fully informed of the temporal dimensions of the charges against Bennett is also abundantly clear from the trial court's instructions, both with regard to the conspiracy count (Tr. 265-266; 268; 271, 273) and the aiding and abetting count (Tr. 274-275). See pp. 29-33, infra.

The trial record shows unmistakably that count two was based squarely on Estrada-Ponce's travelling to and arriving at Kennedy Airport with a quantity of heroin for distribution, secure in the expectation that he had a ready and willing accomplice in Bennett. Moreover, it was clear at trial that the Government sought to have the jury infer that that expectation on Estrada-Ponce's part was based on his prior dealings with Bennett. Trial counsel was therefore compelled by reason to attack the Government's reliance on those prior dealings. There could have been no more thorough and telling attack than one based on the theory of entrapment, which by its very nature denied any and all culpable aspects of any dealings between Estrada-Ponce and Bennett prior to the evening of March 26.

evidence concerning Bennett's March 26 meeting with Estrada-Ponce, he used an entrapment theory (thus attempting to neutralize the evidentiary force of the entire episode) in no way implies a failure to appreciate the government's theory. Under the circumstances, it was entirely reasonable for trial counsel to argue that Bennett had entered Estrada-Ponce's room without intending to engage in a heroin transaction and that he was never "pre-disposed" to engage in such a transaction. Indeed, in this light, trial counsel's arguments based on an entrapment theory and his success in having instructions concerning entrapment included in the judge's charge to the jury (Tr. 275-278) can be seen as the single most effective attack on the government's case as a whole.

Similarly, we submit that Bennett is mistaken in his assertion that even before the evidence ended, defense counsel should have concluded that the conspiracy necessarily terminated when Estrada-Ponce and his two companions were arrested on March 25. In his conversation with Estrada-Ponce on March 26, Bennett stated that he had "some people" to whom he intended to supply the heroin which Estrada-Ponce had just brought him. We note in this regard that count one of the indictment named as conspirators Bennett, Estrada-Ponce and "others known and unknown to the Grand Jury".

Bennett's reliance on United States v. Chase, 372 F.2d 453 (4th Cir.), cert. denied, 387 U.S. 907 (1967) is misplaced. The court in Chase did not suggest that a conspiracy ends as a matter of law with the arrest of some

of the co-conspirators; rather, Chase held that the conspiracy there ended when all of the co-conspirators, save one, had been arrested and there was therefore no one left with whom the remaining (unarrested) co-conspirator could continue to act in furtherance of the conspiracy. 372 F.2d at 459.*/ In the case at hand, the conspiracy charged was of the "chain" variety (Tr. 268) and thus clearly outside the holding in Chase.**/

2. Bennett also urges that trial counsel be found incompetent on the basis of his decision not to present at trial testimony as to the exculpatory loan/pledge

*/ Bennett's representations as to the holdings in Lutwak v. United States, 344 U.S. 604 (1953) and Anderson v. United States, 417 U.S. 211 (1974) are inaccurate. In Lutwak, the Court stated unequivocally that "[r]elevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the declarant's participation therein" (344 U.S. at 618). (Emphasis by the Court). It is difficult to imagine a rule any less helpful to Bennett, either at trial or on appeal. Likewise, Anderson, supra, involves the admissibility of out-of-court declarations and acts of a co-conspirator as against other co-conspirators. It is therefore of no use in the case at hand.

**/ We also disagree with Bennett's recurrent suggestion here that a defendant charged as an aider and abettor cannot be convicted of "possession" solely on the basis of acts that take place after his accomplice becomes an agent for the government; indeed, Bennett could properly have been convicted of "possession with intent to distribute" on the basis of his possession of the heroin sample obtained from Estrada-Ponce on March 26 -- except for the fact that, as the district court observed in a side bar conference at trial (Tr. 245-246), the quantity of heroin contained in the sample was insufficient to warrant an inference of intent to distribute.

theory advanced by Bennett in his motion pursuant to 28 U.S.C. §2255. With regard to this argument, it is useful to note that trial counsel was confronted at trial by Carolyn Usher's testimony that she recalled nothing in connection with the January meeting between Estrada-Ponce and Bennett to suggest the existence of the loan/pledge obligation (Tr. 26). Counsel was further saddled with Bennett's own attempts at exculpation at the time of his arrest -- including his statements that the heroin in his possession was for his personal use (Tr. 65, 138) and that he had believed Estrada-Ponce had marijuana rather than heroin (Tr. 138). Counsel was further aware of the recorded conversations between Estrada-Ponce and Carolyn Usher (Gx. 26) and Estrada-Ponce and Bennett (Gx. 25) -- all of which were devoid of any reference to the jewelry/loan pledge (except under some strained interpretation), but were riddled with inferences concerning an ongoing drug-distribution conspiracy.

All of these matters in evidence were brought to trial counsel's attention even before the commencement of trial. Given that knowledge, there is nothing questionable in trial counsel's tactical decision to move forward with a line of defense not incompatible with the evidence in the government's possession, rather than with an unsubstantiated and patently incredible theory which in any light smacked of recent fabrication.

As Judge Mishler stated in denying Bennett's §2255 motion (App. 57):

Trial counsel appears to have exercised his professional discretion in immediately dismissing the plausibility of the purported loan/pledge defense, and to have instead advanced a cogent and more credible defense theory based on the strength and nature of the government's case. The statements Bennett made to agents at his arrest were exculpatory in nature; trial counsel recognized their import and sought to build a defense around them. It was a credible tactical decision, and a sound defense given the nature of the evidence against petitioner. In no way can counsel's approach be regarded as ineffective.

Trial counsel's choice of tactics, seen in the context of the entire case, cannot be considered as anything but sound. While Bennett may argue on appeal that other tactical choices could and should have been made at trial, the course chosen here is clearly not grounds for reversal. United States v. Rodriguez, *supra*; United States v. Gargiulo, 324 F.2d 795 (2d Cir. 1963).

In summary, it can be plainly seen that in light of the strength^{*} and nature of the government's case at

^{*}/ The jurors began deliberations on August 3, 1977 at 10:03 A.M. (Tr. 290). They returned to listen to government Exhibit 9 between 10:16 and 10:31 A.M. (Tr. 292, 294). They returned for a second time at 11:15 A.M. (Tr. 296) to hear government Exhibit 10, which was furnished at 11:24 A.M. (Tr. 296, 297). At 1:06 P.M. the jury reached the unanimous verdict after a total of approximately one hour and thirty-five minutes of deliberation.

trial, no course of action followed by counsel failed the tests of right reason and sound logic, much less the stringent test of Wight, supra. Rather, a careful comparison of the trial record and Bennett's appeal reveals that here:

[a]s in so many cases of this type, the petitioner freely equates lack of success in his criminal defense with counsel incompetency, and illogically and irrationally blames his predicament, which is primarily of his own doing, upon the inability of counsel to extricate him. Slawek v. United States, 413 F.2d 957, 958 (8th Cir. 1969).

POINT II

THE TRIAL COURT COMMITTED NO ERROR
IN CHARGING THE JURY ON THE ISSUE
OF ENTRAPMENT

Bennett also contends that the district court committed reversible error in granting trial counsel's request for an entrapment instruction since Bennett's acts on March 26, after Estrada-Ponce had become an agent of the government, could not legally constitute the crimes charged. He also argues that the aiding and abetting charge, which was not objected to, erroneously allowed the jury to convict Bennett if it found that Estrada-Ponce possessed heroin on March 26. These claims are without merit.

1. As stated above, Bennett's claim that a conspiracy of necessity ended in the instant case with the arrest of Estrada-Ponce is based on a misconception. A chain conspiracy of the type charged here (Tr. 268) can quite readily survive the arrest of one or more of its members. See United States v. Borelli, 336 F.2d 376 (2d Cir. 1964); United States v. Bruno, 105 F.2d 921 (2d Cir.) rev'd on other grounds, 308 U.S. 287 (1939). Thus, contrary to Bennett's argument on appeal, he was not charged with conspiracy with Estrada-Ponce on March 26, but rather with acting in furtherance of a common conspiratorial plan of which Estrada-Ponce had been but one member until his arrest on March 25. Therefore, an entrapment charge was particularly appropriate to the question of whether on the evening of March 26, in going to Estrada-Ponce's hotel room and there accepting delivery of

a quantity of heroin, Bennett had acted in furtherance of a pre-existing plan or was merely responding spontaneously to the unexpected suggestion of a government agent. While there was a discussion at trial of the legal impossibility of a charge of attempted possession with intent to distribute, based solely on the March 26 meeting (Tr. 245-246), there is nothing in the record to indicate that it was legally impossible for Bennett to act in furtherance of the conspiracy on March 26. As stated by Bennett himself on appeal:

The crucial question for the jury was did Dennis know prior to the time he met Francisco in Room 1608 at the Sheraton that Francisco was bringing heroin to New York? If Dennis did not know of the heroin prior to the time he entered the hotel room on March 26, 1977, he is not guilty of the crimes at issue in this case. Bennett's brief, p. 24.

In our view Bennett's own statement of the issue demonstrates the appropriateness of an entrapment charge, which -- to Bennett's advantage -- drew a clear line between the meeting on March 26 and all that had gone before. The entrapment charge was not only not in error but was actually beneficial to Bennett's interests since in accordance with trial counsel's strategy, it tended to direct the jury's attention to defense allegations that Bennett was ignorant of the heroin conspiracy prior to March 26 and that he entertained no predisposition to deal in heroin. Accordingly, it was well within the court's discretion to accomodate the defense by giving the requested entrapment charge.

2. There is also no reversible error in the aiding and abetting charge. While it is undisputed that both the indictment and the judge's charge based thereon specified March 26 as a reference point in connection with Estrada-Ponce's illegal possession of heroin, which Bennett was charged with aiding and abetting, it is absolutely inaccurate to state, as does Bennett's brief (p. 36), that "the court below charged that the government must prove that Francisco possessed the heroin with intent to distribute it on March 26, 1977 and that Dennis aided and abetted that possession." (Emphasis added). The actual charge at trial included the words on or about March 26 (Tr. 274) (emphasis added). The court went on to state almost immediately that the aiding or abetting charged in count two was "that [Bennett] induced or encouraged Francisco Estrada-Ponce to bring the heroin into the Sheraton Motor Lodge or into New York at Kennedy Airport for the purpose of sale" (Tr. 275). This instruction made it clear that the conduct underlying the aiding and abetting count preceded Estrada-Ponce's decision to cooperate following his arrest.

With the benefit of hindsight, it is of course easy to wish for additional clarity concerning the date on which Estrada-Ponce committed the acts which Bennett was charged with aiding and abetting, but to allege that that slight lack of clarity rises to the level of plain error is frivolous. The trial judge thoroughly explained the ongoing nature of the conspiracy charge (Tr. 267-273) and the importance of Bennett's knowledge thereof and complicity therein prior to March 26 (Tr. 271; 276-278). He

also fully explained the time frame and nature of the conduct (Estrada-Ponce's possession) Bennett was charged with aiding and abetting (Tr. 275) -- conduct which also occurred prior to March 26. He then immediately instructed the jury as to the nature of the entrapment defense concerning Bennett's activities in Estrada-Ponce's hotel room on the night of March 26 (Tr. 275-278), thus suggesting to the jurors the clear possibility that, with respect to any heroin transaction, they could find Bennett had no guilty knowledge or plan whatever prior to arriving at Estrada-Ponce's hotel room. As a practical matter, Bennett's interests at trial were thus well protected considering the evidence against him.

In conclusion, we submit that the judge's charge was not erroneous. Even if, as to count two, a reference to "March 25" would have been preferable to "on or about March 26", the instructions, when viewed as a whole, particularly the portion requiring a finding that Bennett induced Estrada-Ponce to transport the heroin, fall well within the "reasonably clear and accurate" standard applied in this Circuit, United States v. Goldberg, 527 F.2d 165 (2d Cir. 1975), cert. denied, sub nomine Pocono Int'l Corp. v. United States, 425 U.S. 971 (1976). The correction suggested here, even if effected at the time of trial, would surely have made no difference in the jury's verdict, United States v. Johnson, 401 F.2d 746, 747 (2d Cir. 1968). Such "slight" error in a charge, even if clear and undisputed, does not constitute plain error as contemplated by Rule 52(b), Fed. R. Crim. P. See, e.g., United States v. Jenkins, 510 F.2d 495 (2d Cir. 1975);

United States v. Baratta, 397 F.2d 215 (2d Cir. 1968), cert. denied, 393 U.S. 939, rehearing denied, 393 U.S. 1045 (1969). This is especially so where, as here, the instructions as a whole are "properly focused", United States v. Rosenthal, 470 F.2d 837, 844 (2d Cir.), cert. denied, 412 U.S. 909 (1972), and the minor imprecision (if any), when appraised realistically, is insignificant in light of the full weight of the government's case. United States v. Pinto, 503 F.2d 718 (2d Cir. 1974); United States v. Wharton, 433 F.2d 451 (D.C. Cir. 1970); United States v. Umans, 368 F.2d 725 (2d Cir. 1966), cert. granted, 386 U.S. 940, cert. dismissed, 389 U.S. 80, re hearing denied, 389 U.S. 1025 (1967).

POINT III

THE JURY'S VERDICT WAS SUPPORTED
BY SUBSTANTIAL EVIDENCE

Bennett's final claim on appeal is that the evidence against him was insufficient to show that he was involved in the alleged criminal enterprise prior to Estrada-Ponce's arrest. After once more misstating the charges on which he was convicted -- he again implies (Br. 39) that the conspiracy must have ended on March 25 -- Bennett goes on (Br. 39-40) to summarize selectively the evidence presented at trial.

That following a verdict of guilty, the evidence and the inferences to be drawn therefrom must be reviewed in a light most favorable to the government is a principle settled beyond any dispute. United States v. Ricco, 549 F.2d 264 (2d Cir. 1977); United States v. Jones, 374 F.2d 414 (2d Cir.), cert. denied, 389 U.S. 835 (1967). Viewed in that light, the facts here amply demonstrate that Bennett's guilty involvement commenced long before the transaction with Estrada-Ponce on March 26.

As indicated in the statement, Bennet knew Estrada-Ponce well and their acquaintanceship went back at least to January 12, 1977, at which time the two had shared adjoining motel rooms at the Stadium Motor Lodge in New York City and had dined together there.* At the time

*/ In Estrada-Ponce's first telephone conversation with Carolyn Usher on March 26, 1977, Usher noted that it was "better" that Estrada-Ponce had gone to the Sheraton Motor Inn rather than the Stadium Motor Lodge "cause the guy,

of his arrest, Bennett was carrying two cards bearing Estrada-Ponce's residential address in California. Estrada-Ponce kept Bennett informed of changes in that information as is suggested by the first recorded conversation on March 26 (in which Carolyn Usher stated, inter alia, "cause remember you called and gave me the new number"). (Gx. 26).

The jury could also have reasonably inferred that Bennett attempted to keep in contact with each other Estrada-Ponce prior to the latter's March 25 arrival in New York City. Thus, for example, in the first telephone conversation on March 26, Carolyn Usher told Estrada-Ponce, "We've been calling and calling, calling they say you not there" (Gx. 26). While Ms. Usher expressed some surprise that Estrada-Ponce had not called her and Bennett before he arrived in New York City (a reaction which itself implies that Estrada-Ponce and Bennett normally maintained contact), she clearly was not surprised at all that Estrada-Ponce had called her and Bennett after returning from Mexico. Indeed, Usher indicated in the first telephone conversation with Estrada-Ponce that he was expected, both by her and unnamed others. Again by way of example, Usher told Estrada-Ponce: "I wanted to call you try to get with you"; and later in the conversation, she

* / Footnote continued

you know"; Estrada-Ponce expressed agreement noting that there were "too many people" at the Stadium Motor Lodge (Gx. 26). This evidence could have suggested to the jury that Bennett and Estrada-Ponce had been involved together in unlawful drug transactions at least as early as January 12, 1977.

said: "Well, we talk about you every day, this guy call the other day, he asked for you, what you doing, or when you coming or something, you know I tell I don't know cause we haven't heard". It was in this same conversation that Usher spontaneously indicated foreknowledge of Estrada-Ponce's recent visit to Mexico, a known source of heroin.

Bennett was obviously aware of Estrada-Ponce's presence in New York as soon as the first telephone conversation -- on March 26 at 12:15 p.m. -- took place (Gx. 9, 26) as he was at Usher's side during the conversation (Tr. 23-24). It took Bennett over eight hours to reach Estrada-Ponce, during which time Usher continued to lie to Estrada-Ponce concerning Bennett's whereabouts (Gx. 9 and 26, Tr. 24). When Bennett arrived at Estrada-Ponce's room, he did so without any telephone communication at all. Following his arrival at that location, Bennett almost immediately entered into a discussion of heroin ("chiva") with Estrada-Ponce, who at the outset of the conversation identified the heroin to Bennett as "your stuff" with no objection or surprise on Bennett's part (Gx 10, 25). Near the end of that conversation, after a protracted discussion of the heroin and its distribution, Bennett spontaneously inquired "It's going for 33?", clearly indicating a price quoted to him in earlier discussions on the subject.

Under the applicable standard of review, this evidence hardly supports Bennett's contention that the

jury was obliged to conclude that Bennett walked into Estrada-Ponce's hotel room on March 26 an "innocent" man. Indeed, in view of the fact, recited, it is not surprising that the jury deliberated only a total of one hour and thirty-five minutes before returning a verdict of guilty on both counts (Tr. 290-297).

CONCLUSION

The judgment of conviction and the order denying Bennett's §2255 motion should be affirmed.

Dated: Brooklyn, New York
July , 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

ELLA L. HILL

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of July 19 78 ^{she} ~~he~~ served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Richard E. Rieder, Esq.
Attorney for Appellant
161 East 42nd Street
New York, New York 10017

and deponent further says that he sealed the said envelope and placed the ~~same~~ ^{225 Cadman Plaza East} in the mail chute drop for mailing in the United States Court House, ~~Eastern District of New York~~ ^{Brooklyn}, Borough of Brooklyn, County of Kings, City of New York.

Ella L. Hill
ELLA L. HILL

Sworn to before me this

21st day of July 19 78

Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 79